

D.T.E. 03-04-11-A

June 9, 2005

Complaint filed by Mark Thomas, pursuant to G.L. c. 93, §§ 108 et seq., with the Department of Telecommunications and Energy claiming that his long distance and local toll exchange services were switched to AT&T Communications of New England, Inc. without authorization.

ORDER ON MOTION FOR RECONSIDERATION OF
AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

APPEARANCES: Mark Thomas
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PRO SE
Complainant

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FOR: AT&T COMMUNICATIONS OF NEW
ENGLAND, INC.
Respondent

ORDER ON MOTION FOR RECONSIDERATION OF
AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

I. INTRODUCTION

On June 26, 2003, the Department of Telecommunications and Energy (“Department”) issued a final Order in D.T.E. 03-04-11 (“Order”), addressing a complaint filed by Mark Thomas (“Complainant”) pursuant to G.L. c. 93, §§ 108 et seq. In the Order, the Department determined that AT&T Communications of New England, Inc. (“AT&T”) switched the Complainant’s local toll and long distance service providers to AT&T without authorization.¹ Order at 7. Specifically, the Order found that the switch was not authorized because the Complainant’s wife, Kathleen Thomas, with whom the third party verification (“TPV”) agent spoke,² was not the customer of record, and, therefore, did not have the authority to change the Complainant’s telephone services. Id. at 5. In addition, the Order found that the Complainant’s wife answered in the negative when the TPV agent asked whether she was authorized to switch the Complainant’s service. Id. at 5-6. On July 15, 2003, AT&T filed a Motion for Reconsideration of the Order along with a Memorandum in Support of its Motion (“Memorandum”). The Complainant did not file a reply to the motion.

¹ Any unauthorized change to a customer’s primary interexchange carrier (“IXC”) or local exchange carrier (“LEC”) is known as “slamming.” 220 C.M.R. § 13.02.

² According to G.L. c. 93, § 108, a TPV service provider is an entity registered with the Department pursuant to G.L. c. 159, § 12E, that provides customer authorization confirmation services under G.L. c. 93, § 110.

II. STANDARD OF REVIEW FOR RECONSIDERATION

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

III. AT&T'S MOTION FOR RECONSIDERATION

AT&T argues that the Department erred when it concluded that Kathleen Thomas was not authorized to change the services on the account held in the Complainant's name (Memorandum at 2-3). In addition, AT&T argues that the Department erred when it determined that Kathleen Thomas responded in the negative when asked whether she was authorized to change service providers (id.). AT&T asserts that these findings are incorrect as matters of law and of fact, and, therefore, moves the Department to reconsider its Order (id.).

AT&T argues that Massachusetts law recognizes that, for practical reasons, individuals other than the customer of record may need to make service changes (id. at 3, citing G.L. c. 93, § 109(c)(2)(ii)). AT&T also argues that, pursuant to applicable federal law which the Department has elected to administer, the Department may not apply an "actual authority" standard when evaluating an authorization to change providers (id. at 4-5, citing AT&T v. Federal Communications Comm'n, 323 F.3d 1081 (D.C. Cir. 2003)). By applying an "actual authority" standard, rather than an "apparent authority" standard in its Order, argues AT&T, the Department used the wrong legal basis for its conclusions in the Order (id. at 3).

Additionally, AT&T insists that, contrary to the Department's finding, Kathleen Thomas actually answered in the affirmative when she was asked whether she had authority to change service providers for the Complainant (id. at 6). Therefore, AT&T argues the change of the Complainant's telephone service to AT&T was authorized (id.).

IV. ANALYSIS AND FINDINGS

As stated above, reconsideration is appropriate where the Department's treatment of an issue is the result of mistake or inadvertence. For the reasons discussed below, we grant AT&T's motion for reconsideration, yet affirm our holding, on different grounds, that the switch of the Complainant's service was unauthorized.

In the Order, the Department determined that because the Complainant, not his wife, was the customer of record on the account, the Complainant's wife did not have the authority to switch the Complainant's telephone services to AT&T. See Order at 5-7. Because the TPV agent spoke only with the Complainant's wife, the Department concluded in the Order that AT&T had switched the Complainant's services without proper authorization to do so. Id. For the following reasons, we deem that reconsideration is warranted on this point.

The Massachusetts anti-slamming statute, G.L. c. 93, §§ 108 et seq., does not specifically limit the authority to switch service providers to only the customer of record.³ In addition, 220 C.M.R. § 13.03(2) states, in relevant part, that:

The TPV agent must ask whether the person spoken to is the customer of record. If the person responds in the negative, the TPV agent must then ask whether the person is authorized to change a primary IXC or LEC. If the person responds in the affirmative, the verification may continue.

Therefore, under Department regulations regarding TPVs, persons other than the customer of record are specifically permitted to authorize changes in service providers. See also

³ G.L. c. 93, § 109(c)(2)(i), (ii) requires a TPV agent to confirm "the identity of the person spoken to" and "the authority of the person spoken to in order to authorize a change" Therefore, the statute anticipates that "the person spoken to" with authority to change providers may be someone other than the customer of record.

Commonwealth Learning Center v. Broadview Networks, Inc., D.T.E. 03-04-31 (2004)

(holding that carrier could rely on assertions of business complainant's employee that she had authority to change service provider); Hwei-Ling Greeney v. Sprint Communications Company, L.P., D.T.E. 03-04-24, at 9 (2004) ("We note that . . . Department regulations specifically provide[] that someone other than the customer of record may, under specific circumstances, verbally authorize a change in the primary IXC or LEC during a third-party verification call"); Order Adopting Rules to Implement Certain Provisions of Massachusetts' Anti-Slamming Law, D.T.E. 99-18, at 7 (1999) ("The final regulations make clear that authorized persons who are not customers of record may make a carrier selection").

Moreover, the Department agrees with AT&T that federal anti-slamming law also allows persons other than the customer of record to switch service providers. Federal Communications Commission ("FCC") slamming rules define "subscriber" as any of the following:

- (1) the party identified in the account records of a common carrier as responsible for payment of the telephone bill;
- (2) Any adult person authorized by such party to change telecommunications services or to charge services to the account; or
- (3) Any person contractually or otherwise legally authorized to represent such party.

47 C.F.R. § 64.1100(h)(1)-(3). In adopting this definition, the FCC stated that "[t]he definition we adopt . . . allows customers of record to authorize additional persons to make telecommunications decisions." Implementation of the Subscriber Carrier Selection Changes

Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, FCC 00-255, at ¶ 49 (released August 15, 2000).

In addition, in AT&T v. Federal Communications Comm'n, 323 F.3d 1081 (D.C. Cir. 2003), the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit Court”) determined that the FCC’s requirement that carriers obtain “actual authorization” from the service subscriber prior to initiating a telecommunications service change was improper. 323 F.3d at 1085-1088. The D.C. Circuit Court stated that “[t]he actual authorization requirement amounts, as the [FCC] acknowledges, to a strict liability standard” and to impose such a requirement would “charge[] carriers that engage in telemarketing with a virtually impossible task: guaranteeing that the person who answers the telephone is in fact authorized to make changes to that telephone line.” Id. at 1086. Therefore, because both Massachusetts and federal law permit individuals other than the customer of record to authorize changes in service providers, the Department erred by failing to recognize this in the Order.⁴

The Department concludes that, consistent with our standard of review for reconsideration, extraordinary circumstances dictate that we take a “fresh look” at the record for the express purpose of modifying our decision.⁵ We determine that, because individuals

⁴ The Department also erred in its conclusion that the Complainant’s wife stated that she was not authorized to make changes to the Complainant’s service. A review of the TPV recording indicates that she responded affirmatively to the inquiry (Exh. AT&T-1).

⁵ D.P.U. 94-130-B at 2; D.P.U. 90-270-A at 2-3; D.P.U. 558-A at 2.

other than the customer of record may authorize service provider changes, the basis upon which the Department relied in the Order has, upon reconsideration, been reversed. However, we determine that the record of this proceeding provides alternative grounds to affirm our prior holding that the switch of the Complainant's service was unauthorized. We begin with a review of the TPV recording.⁶

The TPV recording indicates that the Complainant's wife was unsure who her husband's telecommunications service providers were, and, at one point, the Complainant's wife sought to end the conversation with the TPV agent by suggesting that the TPV agent speak with her husband instead (Exh. AT&T-1). In addition, when the TPV agent first asked the Complainant's wife whether she would like to use AT&T for long distance service, the Complainant's wife hesitated before responding, "I guess. I'm not sure" (*id.*). The TPV agent asked the Complainant's wife twice more whether she would like to use AT&T services before obtaining an affirmative response (*id.*). Also, the TPV recording indicates that the Complainant's wife was confused about both the purpose of AT&T's telemarketing efforts and the details of the calling plan to which she would be switching when she stated:

I don't know what you want me to say without me looking at the bill or you telling me what I already have now. I was under the impression I wasn't changing anything. Just going back to AT&T. For some reason, somebody switched us over to something else . . .

⁶ The Department prepared a transcript of the TPV audio recording (provided by AT&T on CD-ROM and entered into the evidentiary record as Exh. AT&T-1), and includes it in its entirety as Attachment A to this Order. We, of course, rely on the audio recording in our fact-finding and legal conclusion. We include the attached transcript to clarify our order and increase its value as a precedent to guide future TPV work.

(id.). Following questioning by the Complainant's wife, the TPV agent asked, "May I continue, and afterwards I'll give you a toll free number so that a representative from AT&T will answer your questions?" (id.). In addition, the Complainant testified at the evidentiary hearing that his wife contacted him shortly after her conversation with the TPV agent and was unsure regarding the identities of the telemarketing representative and TPV agent and the purpose of the call.⁷

G.L. c. 93, § 109(c)(1) states that a TPV "shall be accomplished by having a person talk directly to a customer to obtain oral confirmation that the customer did authorize a change in primary IXC or LEC service" (emphasis added). Additionally, G.L. c. 93, § 109(c)(2)(iii) requires the TPV agent to confirm "that authorization has been given to change the primary IXC or LEC" (emphasis added). In other words, at the time a carrier's telemarketing representative transfers a customer to a TPV agent, the customer has already authorized the switch and the TPV agent's duty is merely to confirm that authority for the switch was provided. Moreover, FCC requirements state that:

If a customer needs to obtain additional information, the third party verification must be terminated, and a new verification may commence only after the carrier's sales agent has finished responding to the customer's inquiry. . . . Final

⁷ The Complainant stated that his wife "did not know but she had some feeling that it was some type of telephone switch. She was not aware of who she was speaking with or the company that that person was representing" (Tr. at 10-11; see also Exh. DTE-11 ("My wife received a telephone call from a telephone company and was unsure who it was and what they were doing. At the end of the phone call she immediately contacted me and told me she received some kind of telemarketing telephone call but wasn't sure who it was. She told me she kept insisting they call[] back to speak with her husband and did not want to change anything"))).

verification . . . can only be validly obtained after sales agents have finished providing information.

In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 03-42, at ¶ 40 (released March 17, 2003) (“Third Order on Reconsideration”).

The statements contained in the TPV recording (Exh. AT&T-1), corroborated by the Complainant’s testimony and evidence introduced at the hearing (Tr. at 10-11; Exh. DTE-11), show that the Complainant’s wife was confused throughout her conversation with the TPV agent, and she sought additional information from the TPV agent regarding service providers and calling plans, which the TPV agent acknowledged by suggesting that the Complainant’s wife’s questions could be answered after the confirmation was completed. Instead, consistent with federal and state requirements, the TPV agent should have terminated the verification process and referred the Complainant’s wife back to the AT&T telemarketing representative for assistance with her questions.⁸

Lastly, both federal and state law require TPV agents to obtain verifications for each service to be switched. 220 C.M.R. § 13.04(1); 47 C.F.R. § 64.1120(b). In this instance,

⁸ We note that a customer’s failure to identify his previous service provider is not a basis for invalidating a TPV under FCC requirements. See Third Order on Reconsideration at ¶ 57 (“[W]e agree that it is unnecessary for a subscriber to identify in an independent [TPV] the identity of the displaced carrier”). However, in this instance, the Complainant’s wife’s confusion also included the carrier to which she was switching the Complainant’s services, the type of services she was switching, and even whether a switch of services would be the outcome of her conversation with the TPV agent (see Exh. AT&T-1; Exh. DTE-11; Tr. at 10-11).

AT&T switched both the Complainant's long distance and intraLATA toll providers although there was no confirmation in the TPV recording regarding the Complainant's intraLATA toll service. See In the Matter of America's Tele-Network Corp., File No. EB-00-TC-164, Notice of Apparent Liability for Forfeiture and Order, FCC 01-87, at ¶ 15 (released March 13, 2001) (holding that two separate confirmations for a change in local long distance and interstate long distance are required).

Because the TPV agent did not comply with federal and state requirements when the Complainant's wife sought additional information from the TPV agent, and because the TPV recording includes no confirmation regarding the Complainant's intraLATA toll service, we determine that AT&T did not receive the confirmation necessary to justify a change in the Complainant's services. It is clear from the TPV recording that the Complainant's wife was confused about the purpose of the TPV agent's questions even to the extent that she asked the TPV agent to call back when her husband would be home to answer the questions. Yet the TPV agent persisted until she forced Ms. Thomas to answer her questions. It is clear that Ms. Thomas sought to defer these answers but was not permitted to terminate the conversation. One does not wish to draw a general conclusion from a single TPV recording, but it appears there was a failure of quality control of the process and perhaps of TPV training. For these reasons, we affirm our prior holding in this case, although on different grounds, that pursuant to G.L. c. 93, § 109(a), the change of the Complainant's service providers to AT&T was not authorized.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That AT&T Communications of New England, Inc.'s Motion for Reconsideration is granted; and it is

FURTHER ORDERED: That the June 26, 2003 Order in this proceeding is affirmed, on different grounds; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Judith F. Judson, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within the twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.

ATTACHMENT A

Transcript of TPV Recording
Mark Thomas v. AT&T Communications of New England, Inc.,
D.T.E. 03-04-11

TPV Agent: Thank you for calling EDS. My name is Debbie. May I have your [garbled] please.

AT&T: Debbie, it's Bob David 00530 check 0.

TPV Agent: Bob David 00530 check [garbled] 0.

AT&T: Uh-hum.

TPV Agent: And I'll be speaking to Kathleen Malaly?

AT&T: Uh, you'll be talking to Debbie. And her name is Debbie Thomas. That's what's strange. They used to be . . . You'll . . . It's a different name. Uh. It's the marriage name.

TPV Agent: Okay, what's the contact name sir?

AT&T: It's Debbie Thomas. Her name used to be Manelli.

TPV Agent: Okay, but it's Debbie Thomas?

AT&T: Right.

TPV Agent: Okay.

AT&T: I mean. Uh, you got me crazy. Mrs. Thomas. Uh, I forget her first name now. I have to go back and get it. Okay?

TPV Agent: Yeah, Debbie is my name. [Laughter].

AT&T: Okay, you got me now. I'm crazy. I'll get her name. Hold on.

AT&T: Hi, Ms. Thomas.

Kathleen Thomas: Yeah.

AT&T: Again your name was, uh, first name [laughter] again.

Kathleen Thomas: Mark.

AT&T: No, your first name.

Kathleen Thomas: Kathleen.

AT&T: Is that with a K or a C?

Kathleen Thomas: K.

AT&T: K. Okay, okay. [Laughter]. Ms. Thomas, I have the verifier on the line. She will take care of you through the rest of the verification. Verifier, this is Ms. Thomas.

TPV Agent: Hello, Ms. Kathleen Thomas?

Kathleen Thomas: Yes.

TPV Agent: Hi, my name is Debbie. This is a verification center for AT&T. Today is Friday, October 25, 2002, and I will be confirming your choice of AT&T services. For your protection, this call will be recorded. And this process will ensure that your local telephone company and AT&T identify you as an AT&T customer. May I please have the telephone number to be verified?

Kathleen Thomas: 508-821-2575.

TPV Agent: For telephone number 508-821-2575, is it billed in the name of Mark Thomas?

Kathleen Thomas: Correct.

TPV Agent: Are you authorized to make changes to this account?

Kathleen Thomas: Yes.

TPV Agent: When you make long distance calls, you would like to be using AT&T service. Is that right?

Kathleen Thomas: [Pause]. Hmmm. [Pause]. I guess. I'm not sure.

TPV Agent: Uh, I'm sorry ma'am. I need a yes or no answer. [Pause]. When you make long distance calls, you would like to be using AT&T services, is that correct?

Kathleen Thomas: Are you talking across, across the country? United States? Or out of country?

TPV Agent: Uh . . . No, that's . . . uh. Long distance, I think ma'am, is over the country. Or . . . uh, I'll tell you, long distance calls . . .

Kathleen Thomas: What do we have now?

TPV Agent: I'll read you what long distance is, ma'am. It's the calls, the calls made outside of your local calling area traditionally provided by long distance carriers. May I continue?

Kathleen Thomas: Yeah.

TPV Agent: Okay, ma'am. When you make long distance calls, you would like to be using AT&T service, is that correct?

Kathleen Thomas: Yes.

TPV Agent: And who was your previous company, if any, for local toll service? Or for . . .

Kathleen Thomas: I have no idea.

TPV Agent: . . . for long distance service? Pardon me?

Kathleen Thomas: I guess I don't have the correct answers for you. Um. I don't have the correct answers for you. I don't know what you want me to say without me looking at the bill or you telling me what I already have now. I was under the impression I wasn't changing anything. Just going back to AT&T. For some reason, somebody switched us over to something else . . .

TPV Agent: Okay, ma'am. Then that's . . .

Kathleen Thomas: So . . .

TPV Agent: That's what we're verifying.

Kathleen Thomas: So. [Pause]. Uh.

TPV Agent: Did you . . .

Kathleen Thomas: What did I use before? Was I using AT&T? So I don't know. Because we have Verizon as well. And I don't know what Verizon is for. Is that for out of country?

TPV Agent: Uh . . . I . . . um Ma'am, I'm sorry. I'm just the independent verifier and I do not work for AT&T. I don't have any information regarding AT&T's pricing or plans. May I continue, and afterwards I'll give you a toll-free number so that a representative from AT&T will answer your questions?

Kathleen Thomas: I'll tell you, I'll tell you what. Why don't you call tomorrow when my husband is here and he can answer those questions?

TPV Agent: I'm sorry, ma'am. I . . . I also need to tell you that if you complete the verification, your service will be switched to AT&T. May I continue?

Kathleen Thomas: Yeah. [Loud noise].

TPV Agent: Do you want to continue, ma'am?

Kathleen Thomas: Yes.

TPV Agent: Okay, ma'am. I'll ask you one more time. Okay. When you make long distance calls, you would like to be using AT&T service. Is that correct?

Kathleen Thomas: Yes.

TPV Agent: And who was your previous company, if any, for long distance service?

Kathleen Thomas: I don't know.

TPV Agent: Okay. That's fine, ma'am. I'll just put not sure. [Pause]. [Laughter]. Finally, we need a code to identify you as the person who authorized the decision to use AT&T service. May I have your birth date, month and day only, please.

Kathleen Thomas: 7 - 3.

TPV Agent: And that's July the seventh?

Kathleen Thomas: Yeah.

TPV Agent: Ms. Kathleen Thomas, thank you for answering the questions.

Kathleen Thomas: Okay.

TPV Agent: Your order will be processed for the services you selected from AT&T.
And you have a nice day, ma'am.

Kathleen Thomas: Alright.

TPV Agent: Thank you. Bye bye.

Kathleen Thomas: Bye.

[End of recording].